United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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To be argued by
JOSEPH I. STONE and/or
DAVID LENEFSKY

United States Court of Appeals

For the Second Circuit

75-1391

UNITED STATES OF AMERICA,

Appellee,

v.

LIONEL MARQUEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT LIONEL MARQUEZ

JOSEPH I. STONE
Attorney for Appellant
277 Broadway
New York, New York 10007

To:
DAVID LENEFSKY, ESQ. and
HAROLD GREENBERG, ESQ.,
Of Counsel

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-v- :

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Defendant-appellant Lionel Marquez appeals from a judgment of the United States District Court, Southern District of New York, convicting him after trial with a jury before Hon. Morris E. Lasker of the crime of possession of a Schedule II narcotic drug with intent to distribute, Title 21, U.S. Code, Section 812, et al.

The defendant was sentenced to fifteen years imprisonment by Judge Lasker on November 25, 1975, pursuant to Title 18, U.S. Code, Section 4208(a)(2). The defendant was denied bail pending appeal by Judge Lasker and the United States Court of Appeals. An application for bail in the Supreme Court of the United States is pending.

STATEMENT OF FACTS

Lionel Marquez was indicted in the instant case on July 18, 1975, the indictment was ordered sealed and shortly thereafter Marquez was arrested, pleaded "not guilty" and went to trial. Marquez filed certain pre-trial motions claiming undue delay, double jeopardy, and/or collateral estoppel, selective prosecution, claiming in essence that his acquittal in December 1974, (74 Cr. 1093), was a bar to the prosecution in this particular case. On October 9, 1975, Judge Lasker denied the defendant's motion to dismiss without prejudice to renewal.

It was alleged in Marquez' supporting affidavits that certain letters written to him by Lina Gotes, (the government's main witness), were lost. One letter mailed to his attorney was partially intact, i.e., a difficult to read photostat, and was introduced in evidence. This letter exonerated Marquez. The lost letters were specific items, how the defendant was prejudiced by the government's undue delay.

The government's first witness was Sergio Castillio, who testified that when his son and wife came home from the hospital, Lina Gotes was already there with co-defendant Raphael Samiento and Cholo (indicted herein as Sergio Peralta

Oyandel, 7R). Sergio also testified that Elva Morrales arrived, then left (11R) and Marquez came at nine or ten that night (23R). He identified James Richardson but claimed he was not shown Richardson with a group of photos, but rather an individual photograph (24R). Sergio testified that there was a curtain covering the door of Lina's room. He said Lina opened the front door (29-30R) and that Cholo entered and a package fell on the floor. Cholo wanted water, entered the kitchen and saw and talked to Marquez, (34-35R)..Shortly thereafter, according to Sergio, the "little fat man" (Richardson) left, carrying a nylon white package under his arm. The package seemed bigger when he left than when he arrived (39R). After Marquez and Richardson both left, Sergio testified about a conversation he had with Lina concerning what Chile (nickname of the defendant, Lionel Marquez), said concerning the purchase price of the merchandise (41R). At one point, Sergio claimed that the next day he left the apartment with Lina and went to 110th Street where Lina gave him five hundred dollars (41R). No mention was made as to where the five hundred dollars came from.

He gave conflicting stories as to whether or not he used cocaine in August of 1972 (74-75R). At another point, he claimed to be in the house all of the

next day (August 23, 1972) and he did not see Marquez (77R). He stated that Lina never used the word "cocaine" (85R) and that her buyers were Italian (91R). Shortly thereafter (1973) he was interviewed by the Immigration and Naturalization Service but never told them about Lina (86R).

Sergio claimed that he did not speak to Lina when they were both interviewed by federal agents on November 30th and December 1st, 1974 (66R).

Eliana Castillio was the next witness, who testified that she came home from the hospital fifteen days after August 9, 1975(145-6R).Elva Morales came three or four hours later. Eliana claimed that Lionel Marquez came into her room to see the baby, although he was not introduced by name (151R). She testified she heard him in the kitchen and further testified that she saw him the following day (155R). This was in direct conflict with the statements of her husband and with Lina Gotes. She claimed at trial that she had not spoken with Lina for two years (172R). This agreed with the direct testimony of her husband but was in conflict with Agent Wydel.

Lina Gotes testified next,who admitted being a co-defendant with Marquez in the prior indictment (74 Cr. 1093). She didn't remember the month that the alleged

August 22nd transaction occurred but claimed that both Sergio and Eliana opened the door (188R). She didn't remember the price as to whether it was $14,000 or $16,000 a kilo (190R), but when the deal was discussed, Sergio and Eliana were there and received the cocaine (191-193R). She claimed that Marquez introduced Richardson to Sergio and Eliana and that Sergio showed the cocaine to Marquez (194R). This conflict was so apparent that the government should have prosecuted one of the witnesses for perjury.

Lina further stated that Marquez, Sergio and Eliana were counting the money with Richardson when Cholo came back and Eliana opened the door (196-197R). She testified that the package was opened by Elva Morrales and a friend (201R) and that Samiento gave five hundred dollars each to Eliana and Sergio and herself and the baby one hundred dollars (203R). Needless to say, the baby was not indicted, nor listed as a co-conspirator. Lina claimed that Marquez came the next day and that Sergio and Eliana were there (203-204R).

Lina admitted writing two letters to Mr. Marquez (212R) and a letter to Joseph Stone, his attorney in the prior case and this case. She admitted that the letter said Marquez had nothing to do with cocaine and the letter

was truthful (233R). Her motive to testify was simply that she was not happy with the nine year sentence. Lina did not testify that she received immunity for the 1975 indictment and the jury was not made aware of this fact, although the government, in their answering papers, admitted that they had attained immunity for her prior to Marquez' 1974 trial.

Lina also said that Sergio Castillio was in possession of the cocaine (249R). Lina also did not think that these transactions happened on the same day that the baby came home (338R).

The incidence of the baby seemed to be paramount because the hospital record of September 22, 1972, was introduced in evidence to ascertain the date which was the date of the indictment, however, the hospital record concerning the discharge of Mrs. Castillio and the baby were not available nor offered in evidence. Another item in the defendant's arsenal of weapons attacking the undue delay because of the lengthy period of time between the offense and the indictment. Had he been indicted in 1974, the hospital records might have been available showing a different date, in effect discrediting Mrs. Castillio's testimony.

The government's next witness was Claudio Gayardo. He testified as to a meeting he had with Lionel Marquez in September, 1975, and the conversations that Marquez had with him. As a result of his testimony the government offered a charge to show possible intimidation of a witness, obstruction of justice and consciousness of guilt. He claimed that he sat in the restaurant next to a lady but he didn't see her very well because it was dark (373R). Marquez allegedly told him that he wanted a tape-recording with Amy Vega, one of the four people in the restaurant. Claudio claimed that he received a phone call from Amy that Marquez wanted to see him, the meeting was arranged whereupon he notified Lina and Lina notified the agents, the agents then called him and managed to conduct surveillance.

He admitted delivering letters to Marquez' sister-in-law as well as being an illegal alien and skipping bail (393-395R). He admitted to using the false name of Rios (399R) and receiving nine hundred dollars from Lina (404R). He admitted that Lina told him what to do (408R) and he told Lina after these events that he never mentioned cocaine to the agents (409R). He admitted that he was not in danger, there was no gun shown to him and there were no physical

threats made to him (414R). Nevertheless, he was able to tell Lina all of the facts and she reduced his recollection to writing and he asked for protective custody.

Savario Weidl was called by the government to proove the identification of Marquez which was made by Agent Robert Nieves (426R).

Agent Weidl was the government's case agent in this investigation and was the main prosecution witness in Marquez's prior trial.

Nieves testified that he conducted surveillance of Marquez and Gayardo on September 2, 1975. Nieves said that neither Claudio Gayardo nor Lina ever gave him a description of Marquez (440R). Nieves observed Gayardo eating dinner at the rear of the restaurant with Marquez and two females (450R). After this surveillance Nieves had a conversation with Gayardo (455R). Nieves stated that this conversation with Gayardo after the meeting indicated that Gayardo was in no immediate danger. Gayardo also never mentioned the word "cocaine" to Nieves on that occasion (470R).

At the conclusion of the government's case, defense counsel requested that he be given permission to ask Weidl about the prior acquittal, and specifically as to motive to bring Marquez into the instance case (473-475R).

Counsel also attempted to bring Bancroft Littlefield as a witness to show evidence of the prior acquittal and for an impeachment of Lina Gotes (501-504R).

Mr. Littlefield was also asked whether Lina Gotes had received immunity prior to December, 1974. The government objected. This was sustained and the jury was never aware of that issue.

Agent Weidl was called back as a defense witness and conflicted with Mrs. Castillio and Lina as to whether or not they talked together at the Courthouse in December, 1974 (514R).

Sergio Piralta testified on his own behalf and denied taking part in any narcotics transaction. Lionel Marques did not testify.

The Court dismissed the Conspiracy Count (Count I) against Peralta after the entire case. The government objected and counsel for Marquez objected. The jury was then given the two substantive counts against Marquez and one substantive count against Piralta.

The jury convicted Peralto and Marquez of Count II and acquitted Marquez on Count III.

QUESTIONS PRESENTED

1. APPELLANT'S PREVIOUS ACQUITTAL UNDER INDICTMENT 74 Cr. 1093 BARRED THE CURRENT CONVICTION UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

2. THE COURT ERRED IN NOT PERMITTING THE DEFENDANT TO ADVISE THE JURY OF HIS PRIOR ACQUITTAL TO SHOW GOVERNMENT PERSECUTION AND SELECTIVE PROSECUTION.

3. THERE WAS UNDUE DELAY IN INDICTING APPELLANT.

4. THE JURY SHOULD HAVE BEEN ADVISED THAT LINA WAS TESTIFYING UNDER A GRANT OF IMMUNITY.

POINT I

APPELLANT'S PREVIOUS ACQUITTAL UNDER INDICTMENT 74 Cr. 1093 BARRED THE CURRENT CONVICTION UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL.

The appellant respectfully argues to this Court that he has been compelled for a second time to defend against issues which have been resolved in his favor by a jury in a prior trial.

The increasing complexity of society over the centuries, of the law and of trial strategy, have necessitated the development of the concepts of double jeopardy, collateral estoppel, and res judicata. Despite a stormy history, it is now settled that all three apply to both civil and criminal actions, (Sealfun v. U.S., 332 U.S.575; U.S. v. Oppenheimer, 242 U.S. 85; U.S. v. Adams, 281 U.S. 202, 205; Hong v. New Jersey, 356 U.S. 464, cert. denied 357 U.S. 933).

These three distinct concepts have areas of well-defined applicability, areas of overlap, and gray areas not yet fully litigated and clarified. Semantic imprecision in too many legal writings can lend specious precedent with a resultant denial of due process. So too, the all too common tendency for classification to become rigidly shaped and inflexibly pigeon holed makes it extremely difficult to obtain proper, objective redress regardless the essential validity of a particular appellant's complaint.

Perhaps that is why, it is respectfully suggested, the cases hold that a court must thoroughly study the full records of both the prior and current trial to determine which issues, in whole or in part, were necessarily decided in appellant's favor, irrespective of the verdict.

As this Court saidin U.S. v. Kramer 289 F.2d 909 (1961), application of the principle of collateral estoppel has two phases. The first requires a determination of exactly what the first judgment settled. The second requires an analysis of how that prior determination bears on the second, current case.

What then, did the jury decide when it acquitted appellant in 1974 of all counts?

The jury said clearly the appellant did not conspire to violate sections 812, 841 (a) (1) and 841 (b) (1) (a), of the U.S. Code, which are the very same sections appellant was tried a second time some eleven months after his acquittal. The first jury, in addition, said the appellant did not conspire to possess cocaine with intent to sell, the only Schedule II narcotic drug mentioned in both indictments. The first jury also definitely said the appellant did not conspire to violate the U.S. Code throughout the entire time period specified in the prior indictment, namely from on or about the 1st day of July, 1971, and continuously thereafter up to the

2nd day of July, 1974. Finally, it is dispositively clear that the jury said by its prior acquittal that the appellant did not conspire nor actually commit the substantive offense of buying cocaine from Lina Gotes throughout this entire three year period..

A defendant who has satisfied one jury ought not to be forced to convince another. It would be obvious double jeopardy for the government to relitigate identical charges arising out of the same course of conduct. However, the extensive catalogue of crimes in the Criminal Code does permit the government to charge other crimes arising out of the same course of conduct without violating double jeopardy rights. Nonetheless, the government may not prove such other charges by facts already litigated and settled in appellant's favor (emphasis supplied). (U.S. v. Kramer, 289 F.2d 909; Yawn v. U.S., 242 F.2d 235; Ashe v. Swenson, 397 U.S. 436; U.S. v. Colla, 521 F.2d 605; U.S. v. Jenkins, 95 S. Ct. 1066; Serfassio v. U.S., 95 S. Ct. 1069; U.S. v. Sisson, 339 U.S. 267; Brock v. N. Car., 344 U.S. 424, 9 A.L.R. 3rd 203 et seq.

The government has successfully negated the foregoing principle by a cleverly simple stratagem. By naming appellant as a co-conspirator in this trial, but not as a defendant in the charged conspiracy, the conspiracy was effectively relitigated and the defense of double jeopardy was barred. The appellant could not, after all, be convicted

when he is not a defendant. Due to the stress of trial and the pigeon-hole effect referred to supra, the stratagem succeeded.

The government has simply taken one alleged conspiracy and carved it into smaller, separate agreements, in violation of the principle inShort v. U.S. 91 F.2d 614, referred to in this Court's opinion inU.S. v. Pacelli, 470 f.2d 67 (1972). In the Pacelli case the Short test was not followed, and rightly so, because the arrest and charges under the prior indictment took place before the actions alleged in the second indictment were to have occurred. The Short test is, however, applicable to appellant. Here the alleged events which formed the basis of the second indictment took place prior to all the alleged events which formed the basis of the substantive counts in the first indictment.

There seems to be no precise precedent reported in the literature. It is essential, therefore, to examine the specific effects of such re-litigation to ascertain whether justice was denied appellant and whether unconscionable harm was done to him. It is painfully obvious that the credibility of the charged substantive crimes herein is inextricably based on the relationships between and among the parties developed under the conspiracy count.

Were this testimony properly barred as against appellant under collateral estoppel or res judicata, can it be held that the jury, necessarily, would still have convicted appellant? There is an overlap between conspiracy and substantive counts (Brock v. North Carolina 344 U.S. 424). The prior jury acquitted appellant of three alleged narcotic purchases from Miss Gotes, identical except for the dates to those charged herein. If the conspiracy evidence had been barred, the probability that this jury too would find reasonable doubt is sufficiently high so as to warrant a reversal. At the least, appellant was entitled to a determination as to whether or not any relevant fact or issues in the present trial had been determined in appellant's favor with absolute finality in the prior trial. It is a virtual certainty that such facts and issues, decided favorably for the appellant, would be found since the government's strategy admits that the prior and presently charged conspiracies are identical..

It is just such overreaching by the government, and the consequent injustice to the appellant, that compels the Federal Courts to invoke the doctrine of collateral estoppel despite the apparent the apparent persuasiveness of the government's semantic strategy, (Oppenheimer v. U.S., supra; U.S. v. Zane, 495 F.2d 683; Ashe v. Swenson, supra;

U.S. v. Marakar, 300 F.2d 513, vacated apparently on other grounds, 370 U.S. 723; Williams v. U.S., 179 F.2d 644; Aff'd. 341 U.S. 70; Sealfun v. U.S., supra; 25 L.Ed 2d, 973, 974; 75 Yale Law Journal 262).

The government may not relitigate settled collateral issues, nor can it relitigate, it is submitted, those issues of criminal responsibility which logically and conveniently could have been triedearlier. (Dapcevich v. State, 360 P 2d 779; the Evergreens v. Nunan, 141 F.2d 927 cert. denied 323 U.S. 720; U.S. v. Kramer, 289 F.2d 909; 9 A.L.R. 3d 225; 152 A.L.R. 1187). There may indeed also be a partial bar to relitigation where the issue settled in the earlier trial is not completely decisive of guilt in the second trial. (See U.S. v. DeAngelo, 138 F.2d 446; U.S. v. Cappello, 327 F.2d 378).

In Oppenheimer v. U.S., supra, p.80, the Court invoked collateral estoppel to bar relitigation, even though the second charged offense was separate from the first and even though jeopardy had not attached. The fact that additional evidence in a second trial makes a stronger case is not relevant to the validity of the defense, whether it is called collateral estoppel or res judicata, (Sealfun v. U.S., supra: U.S. v. Zane, supra).

Herein, the government had all of the facts for both trials prior to the first one. It conceded that the reason for splitting the conspiracy and substantive charges into two indictments was that it did not like the strength of its case and wanted more evidence. So the Government split its causes of actions when it found it had overestimated the strenght of its first choices, it brought in its reserves and tried again, the government's success, the appellant submits, is unconscionable and correctible by this Court. (U.S. v Edwards, 366 F.2d 853, 872, C. Den. Jacobs v. U.S., 386 U.S. 908; U.S. v. Cohen, 197 F.2d 26,29).

In sum, the essence of the rule of collateral estoppel rests upon the facts the former acquittal verdict served to conclude and whether the facts so determined are again put in issue by allegations and proof at the second trial of the same defendant for another criminal offense, (U.S. v. Marakar 300 F.2d 513). If an issue of fact is necessarily determined in a prior criminal prosecution which results in an acquittal, that same issue of fact may not be tried again, (U.S. v. Adams, 287 F.2d 701).

Collateral estoppel presents the government from severing related offenses for purposes of trial and compelling a person from proving innocence to two juries, (U.S. v. McGowan, 385 F. Supp. 956). This Court in the Kramer

case, supra, at pat 915, said that " a defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the government need not have tendered the issue". It is respectfully submitted that this is exactly what is at stake in this case. The government's case against appellant at the second trial was necessarily adjudicated in the first criminal proceeding. The government is forcing the appellant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct.

The prior jury said appelland did not have narcotic dealings with Lina Gotes during the same period of time which forms the basis of the second trial.

Appellant must respectfully call to the attention of this Court that this case does have profound implications for the entire criminal law and system. If the government strategy herein is permitted to prevail, then with the refinements and extensions which will inevitably develop the doctrines of double jeopardy, collateral estoppel, res judicata and due process will be set back.

They will unravel so far that it may be a long and painful climb back to the present certainty in the precarious balance between the rights of an accused and those of society.

POINT II

THE COURT ERRED IN NOT PERMITTING THE DEFENDANT TO ADVISE THE JURY OF HIS PRIOR ACQUITTAL TO SHOW GOVERNMENT PERSECUTION AND SELECTIVE PROSECUTION

It is axiomatic that a defendant should have the widest latitude in furnishing his defense, subject only to accepted rules of evidence and trial procedures. The prior trial of appellant, both the record and the result, was essential to his defense on many anticipated issues as well as on others which might have arisen, i.e., additional 3500 material. Specifically, appellant planned to introduce pertinent portions of the prior record on the issues of credibility of prosecution witnesses; intent; knowledge of Miss Gotes' criminal activities; double jeopardy; collateral estoppel and res judicata; government harrassment; possible government misconduct and on what the Assistant U. S. Attorney himself raised, government vengeance.

The trial court would allow the prior record to be introduced but not the result, the appellant's acquittal. Appellant was thus forced into an untenable position. The prior record is replete with the complex ramifications of widespread, illegal narcotic activities. It would have been suicidal to introduce such a record without the tempering effect of appellant's full and complete acquittal.

It appears that neither the digests nor the encyclopedias, C.J.S., A.L.R. or Amer. Juris., provide any direct precedent for sustaining or negating the trial court's ruling. As mentioned in Point I, the government's strategy herein already has resulted in a de novo situation.

The trial court's rationale was that the fact of an acquittal on a prior similar charge has no probative value on the fact of guilt or innocence on a later charge. This is a well-accepted argument. However, appellant respectfully submiys that it should not be the sole controlling argument. It should be balanced against other relevant considerations.

The vast majority of cases under this general subject involve the objection by a defendant to the introduction of prior criminal activity by the government. The current policy clearly appears to be that evidence of prior criminal activity is admissible for any proper purpose except to show bad character and propensity to commit crimes, (U.S. v. Gerry, 515 F.2d 130; U.S. v. Crockett, 514 F.2d 64; U.S. v. Barcroft, 514 F.2d 1073; U.S. v. Kelly, 445 F.2d 1285). Prior crimes and uncharged crimes, wrongs or prejudicial acts can be admissible for purposes of showing motive or intent, scheme or identity, (U.S. v. Freeman, 514 F.2d 1184). Further, acts connected to a chain of events of which the charged crime

is a part are admissible even though they may show other offenses, (Chase v. Crisp, 523 F.2d 545; U.S. v. Reso , 495 F.2d 600; cert. den. 419 U.S. 858). Certainly evidence of other sales are admissible on intent and knowledge of mode of distribution (U.S. v. Conley, 533 F.2d 650).

This liberality in admissibility of evidence of prior crimes is in the face of the defendant's objections. There can be no rationale to limit such admissibility for any purpose except relevance or prevent waste of trial time, where the defendant waives any objections. If a defendant testifies his past record is wholly admissible, with minimal exception, such prior record will include convictions and acquittals. It may be brought in on direct as well as cross examination. There is, thus, no valid reason to redact the fact of the prior acquittal as herein.

The historical development of the admissibility or non-admissibility of prior crimes was predicated on the effect on a defendant's rights. Rights which may be waived. The only right of the government is to be allowed to present a full and fair case. There is no constitutional or statutory protection given to or required by the government. A proper charge will put the fact of a prior acquittal in fair perspective as in all other jury issues.

It must be pointed out that a defendant is taking a calculated risk. The fact of a prior acquittal is not an automatic signal for the jury to follow suit. From what it learns of the prior case, added to the current one, a jury could very well conclude that the appellant got away with the crime once but definitely not this time.

The issue here is the converse of the above general rules of evidence which allow hearsay evidence of prior crimes to show motive. The appellant wanted to admit evidence of a previous trial for purposes of establishing a motive of the government. In other words, while hearsay evidence about other crimes is an exception and admissible if it tends to establish motive for one crime, so too, hearsay evidence about a previous trial should be admissible if it tends to establish motive of the government. The principle of fair play, and decency, so requires.

Indeed reciprocity plays a not insignificant role in the law of evidence. For example, the prosecutions' ability to require advance notice of an alibi witness has been upheld onthe rationale that a defendant has reciprocal and equal rights of discovery (Rule 16 F.R.C.P.).

Be that as it may, the rule in this circuit as compared to other sister courts, as to the admissibility of prior criminal activity is, with all due reference, liberally disposed toward the government. In the courts' own words, the rule " is in the inclusionary form and holds that evidence of other crimes is admissible except when offered solely to prove criminal character", U.S. v. Gerry 515 F.2d 130 (1975).

Why, then, should not a defendant have a fair opportunity to admit hearsay evidence in order to establish the governments' motive? Why, then, should not the defendant have the benefit of an equally inclusionary exception to the hearsay rule?

The words of the trial judge are here relevant. "I thought I made this clear fifteen times already; I will not allow a replay in this trial of the history of the prosecution and trial strategy of the government at the previous trial".

Appellant was not, with all due respect to the District Court, seeking a replay of the previous trial. Appellant was, rather, merely trying to advise the jury of two simple facts which could have been expressed in two short sentences: (1) "The defendant was indicted in 1974 on similar narcotic charges", and (2) "The derendant was acquitted on all such counts".

The jury was indeed entitled to know this very relevant background. That the appellant was tried and acquitted by a jury for conspiring to deal in cocaine between the summer of 1971 and 1974 is obviously relevant information for a jury trying the same defendant for a conspiracy between the summer and end of 1972. That the appellant was tried and acquitted by a jury for possession with intent to sell cocaine in May, August and September, 1973, and in April, 1974, is obviously relevent information for a jury trying the same defendant for possession with intent to sell cocaine in August 1972.

It is indeed ironic that while the rules of evidence governing the admissibility of other crimes has been continuously liberalized for the benefit of defendants so that evidence of a collateral crime is no longer automatically admissibile, here in this case it is the defendant himself who seeks to introduce evidence of a prior alleged criminal act and is prevented from doing so.

If the government has an opportunity to show motive for the crime, so too should a defendant have an equal opportunity to show motive for the prosecution. Motive is a powerfully relevant factor and there is good reason for admitting evidence of any act of appellant relevant to show motive. But so also is motive of the government a powerfully relevant factor which a jury is

entitled to possess in its evaluation of all the facts, circumstances, and nuiances which go towards making the final determination of guilt or innocence.

In the light of the foregoing cases and theoretical considerations, appellant should have been allowed to introduce his prior acquittal without being compelled to take the stand. There were other competent witnesses who could so testify. The prior acquittal was relevant and material to appellant's defenses of witness credibility, intent, criminal knowledge and possible governmental harrassment, amongst others. The government's fear that defense counsel would make effective use of the prior acquittal in his summation is no reason for barring it.

Marquez would have shown that the reason for the prior acquittal contained some of the following: (1) Government witness, Bondaras, testified falsely as to meetings with Marquez in 1968 and 1969, and a stipulation was entered in open court that this testimony was false. (2) Agent Weidl testified to an alleged conversation with Marquez over the telephone and his voice identification made at the time of Marquez's 1974 arrest. (3) A voice expert was brought in as an expert witness and testified that this voice identification was impossible. (4) Lina's post-arrest statement indicated that the phone call was from Freddy and not Marquez. (5) Ten Federal Agents

testified to the surveillance and when confronted with photos were recalled by the government and changed that testimony in open court. (6) The testimony of the prior trial which indicated that the government actually brought in narcotic drugs, put it out for sale and did not recover the drugs nor the money.

Current case law supports as full a disclosure of prior criminal activity as possible, even over a defendant's objection. There is no logic, equity or justice in limiting such full disclosure where the defendant waives any objection by actively seeking such full disclosure.

The fact is the jury was told the appellant was arrested in 1974 but the jury was denied the benefit of the outcome of that arrest. While defense counsel sought to get this simple, yet crucially important information before the jury in its cross-examination of the Special Agent in charge of both the 1974 and 1975 cases, the District Court took the position that it would "have to take the cross-examination question by queation". Yet the Court promptly slammed the door shut after the agent testified that he arrested the defendant in 1974 and in 1975 and was present

in the Federal Court in 1974. And, in slamming that door shut the District Court did not advise the jury to disregard that incomplete evidence.

That testimony indicating a criminal record could only serve to prejudice the jury. Surely it is prejudicial for the jury to learn of a previous arrest and court appearance without being allowed to hear of the outcome of that arrest - the acquittal by a jury. Surely it is reversible error for a District Court who is so adamant in keeping the jury from learning about the prior trial then in the final stages of the second trial to allow the jury to learn of a prior arrest and court appearance without any additional information.

The jury was allowed to speculate upon the seriousness and outcome of the prior arrest. The net effect was to invite an inference by the jury that the appellant was previously convicted, when in fact just the opposite had occurred, he was acquitted. Standing by itself, the evidence amounted to an improper admission of other crimes prejudicial to the appellant.

Here the appellant wanted the entire record to be known: the 1974 indictment, the 1974 arrest and the 1974 acquittal. Instead, all but the most important portion, the acquittal, was revealed.

POINT III

THERE WAS UNDUE DELAY IN INDICTING APPELLANT

Public interest requires more than the specific language of the Sixth Amendment to obviate substantial prejudice to a defendant because of undue delay in his prosecution. Under the due process clause of the Fifth Amendment (U.S. v. Parish, 468, F2d 1129, 1133), various plans were developed pursuant to R.F.C.P., Rule 50 (b) to set standards for defining "undue delay".

While the various plans differ in wording and detail, generally they require a showing of actual prejudice and lack of exceptional circumstances to excuse the delay. Such circumstances must be beyond the control of the Courts and the prosecutor's office. (Barker v. Wingo 407 U.S. 514; U.S. v. Rodriguez 492 F2d 172; U.S. v. Cummings 507 F2d 324; Klopfer v. North Carolina 386 U.S. 213). The foregoing is superimposed on the inherent power of the Federal Court to dismiss with prejudice for undue delay both under the Sixth Amendment and common law. (U.S. v. Furey 514 F2d 1098).

In Prince v. Alabama 507 F2d 693, the Court placed an affirmative duty on the government to actively minimize delay. The fact that the defendant therein was incarcerated in another jurisdiction was not an "exceptional circumstance" excusing the delay. The Court cited

Smith v. Hooey 393 U.S. 374, 383, to the effect that a defendant's right to a speedy trial cannot be diminished merely because he is in jail elsewhere. There are legal means to attempt to bring such defendant to trial. The exact number of days, months or years does not automatically control, but the reasons therefor. The exact duration in any specific case is simply a "trigger mechanism" for a full inquiry (Arrant v. Wainwright 468 F2d 677, 680).

Such strong, explicit development in a legal principle born over six centuries ago, must be in response to a need (Klopfer v. North Carolina, supra), and in response to tactics which unduly upset the careful balance between the rights and responsibilities of the accused and of society. (U.S. v. Dunn 459 F2d 1115, 1119; Beaver v. Hanbert 198 U.S. 77,78).

Mindful of the affirmative duty placed on the government, what excuse or exceptional circumstances can the government offer herein? The record shows (p. 128, 226, 315, 497, 518, 525-528, 706), that the testimony used in this trial was known to the government before appellant's 1974 indictment and trial. This is conceded in the summation and in various affidavits submitted by the government to the trial court herein (Davis' affidavit pp 2,5; Weidl's affidavit, pp 3,4; Littlefield's affidavit, pp 7. In Ross v. U.S. 349 F2d, a seven month delay between

the government's knowledge and indictment was held prejudicial. Further, appellant was arrested in 1974. All the facts were known, and the date of arrest, unarguable, starts time running (U.S. v. Marion, 404 U.S. 307; U.S. v. DeTienne 468 F2d 151).

Appellant's 1974 indictment (appendix exhibit) involved the same conspiratorial group as in the present indictment. The government simply left out, as a reserve, several of the co-conspirators and several known alleged substantive sales. The present Counts II and III could have been included in the 1974 indictment. For tactical reasons the government did not do so. There is no logic which can equate such a ploy with the government's "affirmative duty" to move expeditiously. Pre-indictment delay is prejudicial to a defendant if it is an intentional device to gain a tactical advantage over the defendant, (U.S. v. Marion, supra). Allowing the government two "shots" at the appellant clearly is prohibited delay (U.S. v. DeTienne, supra).

Since the government can scarcely contradict the effects of the cited cases, it will probably fall back on the argument of where is the harm to appellant? He was not incarcerated.

The harm runs much, much deeper. The fact of appellant's acquittal in 1974 on all counts, while not allowed before the jury, was before the Court (R. p220). In the 1974 indictment appellant was specifically joined with Ms. Gotes in at least four overt acts and three substantive counts involving sales between them in 1973 and 1974. How can anyone say that the addition of the instant two counts of alleged 1972 sales, pp 4 of the original alleged conspiracy, would or would not have changed the verdict? Certainly under any rational definition of reasonable doubt it must be assumed appellant would have been acquitted on the two 1972 counts as well.

The only excuse given by the government is that it was not satisfied with its case against appellant, under the 1975 indictment until it had the testimony of one Liliana Rodriguez (affidavit of Assistant U. S. Attorney, Davis. The 1974 trial did not convince the jury of appellant's guilt. Yet, Liliana Rodriguez was never called as a witness nor any excusable explanation offered for this failure. The fact that this time around the government wona conviction simply proves that the second time around a better prosecuting job can be done. This is the very evil that the Fifth and Sixth Amendments, F.R.C.P. 48 (b) and 50 (b), the several plans to minimize undue delay and present case law seek to prevent.

The story of Ms. Gotes that she would not testify against appellant out of fear is self-contradictory. It is contradictory, in that her guilty plea, of necessity implicated appellant. They were inextricably linked in the indictment. Surely, the government will not contend that Judge Frankel did an inadequate job of inquiry when he accepted Ms. Gotes' plea of guilty.

A simpler explanation for Ms. Gotes' refusal to testify in 1974 is that she hoped to get a minimal sentence and then happily back into business as an informant and as a dealer as before. (with the government's approval?) The following are specific items of prejudice:

1. The hospital record covering Eliana Castillo was lost (612 R).
2. Two letters admittedly written by Lina Gotes to Lionel Marquez were lost.
3. Jimmy Richardson was dead and his son was unavailable.
4. The original letter to Joseph I. Stone was lost after the first trial.

POINT IV

THE JURY SHOULD HAVE BEEN ADVISED THAT LINA WAS TESTIFYING UNDER A GRANT OF IMMUNITY

The government has the affirmative duty of advising the jury that Lina had immunity before she testified in the Grand Jury and certainly should have advised the petit jury in the case at bar.

Mr. Davis in his summation alluded to Lina Gotes' biggest motive as being concerned with the nine year sentence (706R).. Mr. Davis further stated that Lina Gotes confided in the Agents (DEA) completely in November, 1974.

Here, as in Giglio v. U. S.(405 U.S. 150), the issue remains:

Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of conviction entered on November 25, 1975 be reversed because the defendant was subjected to a deliberate and oppresive undue delay; the conviction was barred under the doctrine of Collateral Estoppel; the Court refused to allow the jury to know of his prior acquittal, and in essence, the interest of justice and the doctrine of fundamental fairness can only be served upon a reversal of this judgment of conviction, a dismissal of the indictment, or in the alternative, to remand the case for a new trial.

Respectfully submitted,

JOSEPH I. STONE
Attorney for Defendant-Appellant
Office & P. O. Address
277 Broadway
New York, New York 10007

DAVID LENEFSKY and
HAROLD GREENBERG
Of -counsel on the brief.

Service of Two (2) copies of the within
is admitted this 22 day of January 1976

United States Attorney